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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN - 4 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	MM Docket No. 92-259
Broadcast Signal Carriage Issues	

COMMENTS OF
THE UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association (USTA) respectfully submits these comments in response to the Notice of Proposed Rulemaking (NPRM) in this proceeding, FCC 92-499, released November 19, 1992. These comments focus on the issues raised in paragraph 42 of the NPRM. USTA urges the Commission to adopt rules that provide for the compensation contemplated by the Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385, but preclude double recovery by broadcasters as a condition of retransmission consent. Congress, in adopting new Section 325(b) of the Communications Act, did not intend that broadcasters be compensated more than once for each retransmission.

The question arises at all because of Congress' use of the phrasing, "no cable system or *other multichannel video programming distributor* shall retransmit the signal of a broadcasting station...", in Section 325(b)(1). The Act defines

a MCVPD (multichannel video programming distributor) as "a person *such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor,* who makes available for purchase, by subscribers or customers, multiple channels of video programming." Section 602(12) (emphasis supplied).

In paragraph 42 of the Notice the Commission "seek[s] comment on the scope of this definition." Elsewhere the Commission notes in footnote 13 of its NPRM in Docket No. 92-265 "that the complete scope of this definition is unclear...."[1] The Commission further notes in paragraph 42 of the instant NPRM, the term MCVPD "is used extensively in other parts of the 1992 Act...."

The rationale for retransmission consent does not apply in the VDT (video dialtone) or channel service contexts. A common carrier offering only these services is not among those entities specifically enumerated in Section 602(12) nor is it "like" any of the enumerated entities, as is demonstrated below.

USTA submits that the Communications Act, as amended by the 1992 legislation, does not require common carriers operating VDT systems or offering channel service to obtain retransmission consent, either literally or by implication. Section 602(12)

1/ Competition in Video Programming (FCC 92-543), released December 24, 1992.

does not describe these carriers' operations, since the carriers would not make available broadcast programming directly for purchase by their subscribers or customers. The cable operators' customers are not identical to the common carriers' customers. Common carriers deliver broadcast and other signals for cable operators to the cable operators' customers. The broadcast signals are made available by cable operators for purchase by their subscribers. A common carrier does not deliver these signals to the cable operator to purchase for its own viewing.

(1) *VDT carriers are not like cable operators.* VDT and channel service providers are not "like" cable operators. Broadcasters and common carriers, unlike cable operators, are not in direct competition with one another under the Act, since broadcasters are not common carriers.[2] Common carriers would not compete for the same national and local advertising, and providers of video programming who use VDT would pay for any broadcast programming services carried on VDT systems for them. Cf. S.Rpt. 102-92 at 35 (1991). Common carrier providers of VDT service and channel service are not "cable operators" within the

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2/ Section 3(h) of the Act provides that "'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio...; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

meaning of the Act;[3] their networks are specifically exempted by Section 602(7)(C). They are not themselves providing video programming "directly" to subscribers within the terms of that section or Section 613(b). Unlike cable operators, they do not "use[] broadcast signals" within the meaning of Section 325(b). See S.Rpt. 102-92 at 37. Nor are common carriers subject to copyright liability under 17 U.S.C. § 111(a)(3).[4] Any other construction would result in double payment to a broadcaster.

(2) VDT carriers are not like providers of *wireless services*. VDT and channel service providers, as operators of terrestrial facilities, are not like the operators of any of the

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3/ Telephone Company-Cable Television Cross-Ownership, 7 F.C.C. Rcd 5069, 71 R.R.2d 66 (1992), appeals pending. Congress, in enacting the 1992 Cable Act, did not see fit to change the Commission's construction of Sections 602 and 621(b)(1) of the 1984 Act.

4/ Section 111(a) provides in pertinent part that --

> The secondary transmission of a primary transmission ... is not an infringement of copyright if --
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> * * *
>
> (3) The secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use or others: *Provided,* That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions....

See also Section 119(d)(6) of 17 U.S.C. (exempting satellite common carriers providing television station signals directly to home viewers).

wireless services enumerated in Section 602(12). Nor do cable subscribers fall within the statutory definition of satellite service subscribers in 17 U.S.C. § 119(d)(8). Such satellite services have a special and unique place in the 1992 Act, and each offers its video programming services "directly" to subscribers. This is not the case with a pure VDT system in which the carrier does not offer video programming.

Any other construction also would result in double-payment to the broadcasters for the same retransmission. Section 325(b) operates only with respect to "broadcast signals." With certain discrete exceptions, any cable operator's facility that carries broadcast programming to multiple subscribers in the community is a cable system and hence subject to retransmission consent. When television signals are carried, *there will be one MCVPD. But there should not be* two. Section 602(7)(C) prevents this in the case of VDT and channel service by excepting "a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act...."[5] Cf. U.S. v. ASCAP, 782 F.Supp. 778, 809-15 (S.D.N.Y 1991), aff'd per curiam 956 F.2d 21 (2d Cir. 1992), cert. denied, 112 S.Ct. 1950 (1992), and NCTA v. BMI, 772 F.Supp. 614, 647-50 (D.D.C. 1991) ("clearance at the source" decisions under copyright law).

5/ The exception following does not apply, since the phrase "video programming directly to subscribers" must be construed consistently with Section 613(b) of the 1984 Act.

Conclusion

For the reasons stated above and in paragraph 42 of the Commission's NPRM herein, the Commission should adopt a construction of Section 325(a) excluding providers of VDT services and channel service, *qua providers,* from any requirement for retransmission consent.

Respectfully submitted,

MARTIN T. McCUE

Vice President & General Counsel
United States Telephone Association
900 Nineteenth Street, N.W., # 800
Washington, D.C. 20006-2105
(202) 835-3114

Attorney for
United States Telephone Association

January 4, 1993